

**COMMENTS OF WAYNE G. STRANG, NOTICE OF PROPOSED RULEMAKING (NPRM) IN
THE MATTER OF THE TELEPHONE CONSUMER PROTECTION ACT, DOCKET #05-338**

Background

I am a resident of the State of California interested in protecting my right to privacy through enforcement of the Telephone Consumer Protection Act (TCPA) of 1991. Through my efforts, I have gained considerable experience with, and gained knowledge of, some of the workings of the telemarketing industry.

I thank the Commission for giving me the opportunity to comment on the implementation of the Junk Fax Prevention Act of 2005 (JFPA). If not implemented with caution, this misnamed act will result in a proliferation of junk faxes throughout the nation over and above the billions that are already sent each year. I implore the Commission study carefully all options and choose only those that continue to protect the privacy and property rights of the consumer, limit the opportunity for "cost shifted" advertising, and yet comply with the requirements of the JFPA. The Commission's influence through its analysis and discussion in the Report and Order that will conclude the rulemaking process will directly advance or impede the effectiveness of the law.

General

The junk fax industry has long been a thorn in the side of the American public. What amounts to large-scale petty theft was allowed to go on until the enactment of the Telephone Consumer Protection Act in 1991 and its implementation in 1992. Even after the implementation of the Act, junk faxers found successful "workarounds" and thrived.

In its original 1992 Report and Order, the Commission erred and stepped outside of the Act¹ to provide an "established business relationship" exemption to the junk fax and prerecorded message prohibitions contained in the Act. Coupled with the Commission's ill-defined application of its rules to "affiliated entities"², telemarketers and junk faxers have been able to break the law with impunity in many jurisdictions.

In implementing the Junk Fax Prevention Act, which "prevents" junk faxes by making more of the unrequested ads legal, the Commission must be **especially careful** in its wording in the Order that results from this NPRM. Rest assured the junk faxers will take full advantage of any statement that is not crystal clear. If I were cynical, I would

¹ The Commission itself noted that it was "without discretion" to create additional exemptions, yet it did just that in providing for an EBR for junk faxes and prerecorded voice advertising calls.

² See 47 CFR 64.1200(d)(5) stating that the rules do "...not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised." The mortgage industry in particular uses this wording to claim that because lender A holds someone's mortgage, and the calling broker sometimes deals with lender A to fund a loan, lender A's EBR with the consumer also applies to the calling broker.

suggest the Commission use words of no more than two syllables so that the industry cannot pervert their meaning.

The Commission should not labor under the misconception that junk faxers will be burdened in any way. They will merely ignore those regulations they find irritating or that cut into their profit margin. They are well aware that enforcement is lax. Even in the Fax.com, Inc. matter, the Commission failed to enforce the identification requirements contained in 47 CFR 68.318(d)³, so the industry feels comfortable in omitting identifying information.

These comments will take the form of observations and suggestions on each topic the Commission set forth in the NPRM. It should also be noted that these comments apply to the sociopathic elements in our midst that use other people's fax machines for their own benefit, and not to entities that are merely faxing membership renewal forms, items of genuine interest to an existing customer, or documents required in a business transaction. Although the latter entities are a major push behind this ill-advised legislation, to the best of my knowledge not one of them has ever been improperly sued.

Comments and Recommendations

A. Recognition of an Established Business Relationship (EBR) Exemption

The Commission continues to, but should **not**, confuse the EBR with the phrase "prior express invitation or permission".⁴ Not only does this not reflect the law (in the law the conditions are completely separate and do not define each other), it gives junk faxers yet another ambiguity to use to confuse the courts.

It is absolutely **imperative** that the Commission establish clear and specific parameters to define what creates an EBR.⁵ As previously noted, junk faxers have proven many times over that they will twist the meaning of words in order to persuade a court that they have the right to fax to an unwilling recipient. One notable junk faxer used to claim that their faxes were legal because they did not use a dialer that generated numbers in sequence or randomly, but instead used a dialer that took numbers from a database. Another faxer claimed that a non-response to a "permission slip" faxed to a recipient established a business relationship with that recipient.

Congress made clear in the JFPA that the EBR exemption would not apply unless the fax recipient **voluntarily** supplied the fax number **at which the fax was received**.⁶ The burden of proof demonstrating such voluntary cooperation should lie squarely on the shoulders of the faxer. I suggest that the proof maintained by the faxer must include at a minimum; 1) The name of the entity with whom the EBR exists; 2) the date the EBR was established; 3) the fax number such entity supplied to the faxer; 4) the context under which the EBR was formed;

³ Notice of Apparent Liability for Forfeiture, EB-02-TC-120, issued to Fax.com, Inc., August 7, 2002

⁴ See paragraph 9 of the NPRM. "As discussed below, in the context of an EBR, **such prior express permission...**" [emphasis added]

⁵ Paragraph 10 of the NPRM

⁶ 47 USC 227(b)(1)(C)(ii)(I)

5) any limitations placed on the use of the number (expiration date, number of faxes per month, etc.) by the consumer; 5) if for multiple vendors, the names of those vendors or the types of property, goods or services covered; 6) whether or not the EBR extends to other entities that have a relationship with the faxer, and; 7) a copy of any website, directory listing or other document that the faxer contends shows the "voluntary" supplying of the number, along with a copy of any document that demonstrates the existence of the EBR.

Of particular note is the proposed requirement to name individual vendors, or at least a product category, before legitimizing fax blasting. Entities like Fax.com, Inc. would love seeing the Commission codifying the EBR in a fashion that allows them to blast their garbage without limit to a person who merely called one of Fax.com's customers to see what the store hours were. Such a call would establish a business relationship with **all** of Fax.com's customers. Make no mistake. That **is** how the industry will interpret any generally worded regulation.

The Commission should specify instances in which a number may **not** be considered as a "voluntarily obtained" number, and should make it as easy as possible to deny junk faxers the use of a consumer's fax number. For example, if a fax number is listed on a private party's web page, and the number specifies "NO ADS", the EBR is to be considered terminated for the purposes of faxed ads⁷. Any store receipt that requires a consumer to supply their fax number to receive service, may also be annotated with "NO ADS", thus denying the use of the number for faxed advertising. Warranty cards returned to a manufacturer are not to be considered "publishing" of the fax number. These points are particularly important as I previously noted, Congress failed to consider the effect of ongoing or intermittent relationships such as with grocery stores, telephone companies, banks, etc. Indeed, the Commission should consider adoption of a regulation stating that a "NO ADS" annotation on any document⁸ is a do-not-fax request.

Another area the Commission must address is the applicability of the EBR exemption to "affiliated" entities. One mortgage broker, 1 Home Lending Corporation which does business as Capital Line Financial Services, had at one time more than 150 telephone lines capable of mass-broadcasting prerecorded voice advertisements⁹. When taken to court, the company claims to be "affiliated" with a homeowner's mortgage company because they sometimes fund loans through that company, thus they (Capital Line) have an EBR with the consumer merely because the mortgage company actually funds the loans brokered by Capital Line. For example, homeowner A does business with mortgage broker B. The broker then funds the mortgage through Countrywide Home Loans. Capital Line then claims that it has an EBR with homeowner A because it too funds some loans through Countrywide. It claims that since it deals with Countrywide mortgages, and homeowner A has a

⁷ Such designation should also apply to other forms of telemarketing, but the scope of the JFPA does not extend that far.

⁸ This would include any electronic document. The Commission should specify that any website requiring entry of a fax number must include a "No Ads" option or the EBR is not formed.

⁹ The Commission issued a citation to the company in 2003, and did not take enforcement action when further violations were reported.

mortgage with Countrywide, and Capital Line identifies itself as a mortgage company (though does not state that it sometimes funds mortgages through Countrywide), there is an "affiliated entity EBR" in the Commission's regulations.

This ridiculous application of the "affiliated entities" definition contained in the Commission's rules¹⁰ should be re-addressed with emphasis in the new rules and particularly in the Report and Order.¹¹ The Commission should state unequivocally that the EBR exemption applies only to entities that have directly dealt with the consumer. The EBR between a consumer and an entity should not create an EBR with other entities that are "affiliated" only through a tenuous business relationship such as dealing with the same lender.

Finally, the Commission must make it absolutely clear that if the sending party or advertiser is not properly identified, the EBR does not exist.¹²

B. Definition of Established Business Relationship

The definition of the EBR should be time-limited just as the definition of the EBR for other telemarketing methods is time-limited. Because consumers have lost faith with the Commission's dedication to enforcing the TCPA, I would suggest the Commission allow more than 3-months of complaints to accumulate prior to taking action. Many consumers I am aware of have stopped complaining about junk faxes and other unlawful telemarketing methods because they have seen no action taken against serial offenders even though those offenders have been previously cited.

Should the Commission decide to include a time-limit on the EBR for junk faxes I would suggest a limit not to exceed 1-month for EBRs based on an inquiry, and 6-months for EBRs based on an actual purchase. Because cost-shifted advertising is involved, a limit shorter than that established for other forms of telemarketing is justified. The Commission should also make it clear that the time limit set for the expiration of the EBR is set in concrete and should reemphasize that the EBR may be terminated by the consumer at any time prior to expiration by issuing a do-not-fax request.

The Commission should recognize that inquiries made solely for the purpose of enforcing the law, do not establish a business relationship and make future faxes "legal". The junk fax industry intentionally omits necessary identifying information from their advertisements. They do this to, 1) make it harder to identify the source of the fax; 2) make it harder to identify their client, the advertiser, and; 3) to allow them to send the same fax on behalf of numerous entities thus decreasing their costs per transmission.

Standard practice in the industry is to use "interest" telephone numbers that lead to an operator at a call center that refuses to identify the call center or give any information about the advertiser.

¹⁰ 47 CFR 64.1200(f)(5)

¹¹ The Commission attempted to address the issue in Report and Order 03-153, paragraph 117, but used regrettably vague language.

¹² 47 USC 227(b)(2)(D)(vi)

After asking certain screening questions, they "hot transfer" the call to the advertiser's business. Any mention of the illegality of the fax results in a hang up. At times I have been disconnected merely because I asked too many questions about the sender of the fax. The only way to identify the advertiser is to feign interest in the product advertised. The Commission should explicitly state that such inquiries do not establish the business relationship.

In view of the above, the Commission should make clear in its discussion of the EBR exemption that inquiries made for the purpose of identifying the sender of a fax, or the entity advertised by that fax, do not establish any sort of business relationship.

In addition, the Commission should establish requirements that any toll-free number furnished for the purpose of allowing a person to issue a do-not-call request, be answered by a live-person or a recorded message that identifies, 1) the sender of the fax; 2) the names of all advertisers using that toll-free number, and; 3) the complete physical address of each.

Toll-free "remove" numbers that junk faxers use today¹³ use recorded messages that purposefully omit any identifying information. Used in this fashion the miscreant may claim that nobody ever called, or that the do-not-fax request was issued to a different company. In the era of the JFPA the Commission must be aware of and act to curtail this behavior.

C. Notice of Opt-Out Opportunity

As noted in my general discussion, it is necessary for the Commission to be specific when dealing with telemarketers. In this case the Commission **must specify the exact wording, location on the page, and font type and size to be used** in the opt-out message in order for it to comply with the rules. If the Commission does not specify the wording, it will be a golden opportunity for junk faxers to weasel out of compliance. The notice should be considered clear and conspicuous only if it echoes the notice specified by the Commission in the manner specified by the Commission.

In the Commission's NPRM you, "...seek comment on ways to minimize the burdens associated with complying with these separate requirements that are consistent with the goals of the TCPA and recent amendments"¹⁴ There is **no**, I repeat **no** additional burden over and above the notification requirements of the JFPA. The junk fax industry will claim there is, but as the industry and Commission well know, the ID requirements of the TCPA and the Commission's regulations require that the sender or advertiser be identified in the header of the fax **or**, **"...on the first page of the transmission..."**¹⁵ In establishing the

¹³ Junk faxers provide toll-free numbers today in an attempt to escape enforcement. They claim anybody not removing their fax number from a database must want junk faxes and should not be able to recover statutory damages. They neglect to mention this also removes one obstacle to their continuing violation of the law.

¹⁴ Discussing the ID requirements in 47 CFR 68.318(d) and the notice requirements of the JFPA. NPRM paragraph 21.

¹⁵ 47 USC 227(d)(1)(B)

requirements for notification under the JFPA, the Commission may simply specify that the sender or advertiser's ID information be a part of the notification.

Opt-out requests must be honored in the shortest possible time. In the past, the Commission was lenient with telemarketers providing that, "Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request." Predictably, telemarketers now tell requesters that it will take 30-days to comply with the do-not-call request regardless of their actual capability to comply. They do so even if they regularly offer completion of any proposed transaction within a much shorter period of time¹⁶.

Junk faxes are by necessity, fully automated. It should therefore be exceedingly simple for a junk faxer to include a number on a do-not-fax list. For that reason alone I recommend that the Commission requires that the do-not-fax request be honored as soon as possible, but in no case to exceed seven (7) days.

The Commission should also realize that junk faxers will argue for much longer "grace periods" in order to maximize their profits. They will also use the extra time to blast as many faxes as possible to the opted-out number. Even under the original law, I received up to four faxes per day from a single source¹⁷. An individual blaster of course, is capable of sending countless faxes to a single fax machine if it chooses to do so.

Like the telemarketing industry, the junk faxers will cry "foul". It would not surprise me to see the industry set up more creative ways to bamboozle the Commission into granting them more time to honor a do-not-fax request. They may set up the required toll-free numbers at a remote location, and then complain that the accumulated requests are only sent to them once per month. They may complain that they have to set up multiple numbers in multiple locations to comply with the law in a cost-effective manner, and that it takes 3-months to collect all the data.

The Commission should reject these attempts to eviscerate the rules.

Lastly, unlike in the past, the Commission must require some mechanism that informs the consumer of the date their do-not-fax request was received, and/or the date it was processed. Not to belabor a point, but junk faxers have proven time and time again that they are willing to lie and falsify documents in order to ply their trade. Requiring this confirmation would make one such ploy less likely.

D. Request to Opt-Out of Future Unsolicited Advertisements

¹⁶ Long distance carriers have frequently cited a maximum of 5 days to make a change, but claim it will take 30 days to honor a do-not-call request.

¹⁷ Attributable to the same source as evidenced by the identical headers.

It is absolutely imperative that the Commission establish numerous acceptable alternatives¹⁸ for issuing a do-not-fax request. For some of these methods, the "time to honor" previously noted may be extended. The methods established should include, but not be limited to, the following:

- a. A toll-free "opt-out" number that allows opt-out 24-hours per day. Such number may use a recording, but in any case **must** identify the sender of the fax and the advertiser so that a consumer may take action if the do-not-fax request is ignored.
- b. A toll-free fax number that complies with the requirements in a.
- c. Via First-Class mail.
- d. Via a "No Ads" entry on publication of the consumer's fax number on any website or in any directory.
- e. Via entry of the fax number in the national do-not-call database.
- f. At the point of sale or signing of any contract.
- g. Via e-mail.
- h. Via in-person request.

All do-not-fax requests should be honored, no matter what method is used to transmit the request, though additional time to honor the request may be allowed. For example, a request made via First-Class mail may be honored within 14-days rather than the 7-day requirement previously noted that may apply to phone/fax/e-mail requests.

I would also suggest that the Commission **require an acknowledgment of receipt** of the do-not-fax request. Such acknowledgment may be via facsimile transmission to the number(s) included in the request and must include the name of the sender, the name of the advertiser, acknowledgment of the receipt of the request and the date it was received, and a toll-free phone number to call if there are future problems. This notice would also serve as further proof that the consumer requested removal.

Any do-not-fax request to a junk fax broadcaster must apply to **all customers of that broadcaster** unless the consumer specifically asks for faxes from particular advertisers. As an extension of that principle of course, the request would apply to the advertiser on whose behalf the fax was sent. Fax.com proved long ago that there are many ways to continue faxing even after a request not to fax is received. The blaster may simply fail to identify itself and when subsequent faxes are received, claim not to be the entity behind previous faxes. They may establish numerous "opt-out" numbers through a third party, and then claim that none of these numbers belong to them. Fax.com went so far as to claim that an "opt-out" request through its automated system was actually an "opt-in" request.

In enacting the JFPA, Congress neglected to consider the effect of the law on intermittent business relationships. For example, if I

¹⁸ The Commission has this authority under the §227(b)(2)(E)(ii) of the amended TCPA

buy a computer at a national store, then tell them not to fax me any advertisements, am I subject to their fax-blasting if I buy another computer next month? I should not be required to submit a **second** do-not-fax request to avoid those advertisements. The Commission must make it crystal clear that a do-not-fax request terminates the EBR **and** that the EBR is not reestablished unless the consumer gives consent. Any such consent of course, should be documented in writing and the junk faxer or advertiser should bear the burden of proof that the consent was given.

The Commission should also make clear that in a continuing business relationship, such as a mortgage or a newspaper subscription, the do-not-fax request terminates the EBR. The Commission's prior declaration of this interpretation of the TCPA and the Commission's own rules, was buried in footnotes in the original Report and Order. That oversight should be corrected in this Report and Order.

In establishing these regulations, the Commission must be mindful of, and respond to, all the opportunities to evade the law.

E. Authority to Establish Nonprofit Exemption

The Commission should **not**, under any circumstances, give a blanket exemption from the notification requirements to nonprofits! In overstepping its authority under the previous law¹⁹, the Commission granted such exemption to the prerecorded advertisement prohibition of the TCPA. The result was a proliferation of nonprofit companies set up solely for the purpose of telemarketing for their for-profit sister company. This of course led to a large increase in the number of prerecorded advertisements foisted on the American public.

As previously noted, mass faxing today is a completely automated process. There is virtually no cost to the nonprofit to include the notification in the fax. In fact, since they would be faxing only on their own behalf, the notice would be a simple "cut and paste" announcement.

Should the Commission decide to allow this exemption, it must be clear and specific in its scope. The exemption should apply **only** to nonprofit entities faxing to their own members, and even then, any request not to be faxed must be honored.

A similar argument can be made to **not** allow exemption from the notification requirements for small businesses. Frankly in my experience, small businesses through the agency of the junk fax broadcasters are the **worst violators** of the TCPA. In particular, mortgage brokers here in CA hire companies purportedly to supply them with leads, and then complain that they are not responsible when that agent faxes tens of thousands of ads for them. They claim ignorance of the method used, but continue the practice even after being taken to

¹⁹ §227(b)(2)(B)(ii)(II) prevented the Commission from exempting **any** call that contained an unsolicited advertisement, yet the Commission's rules **allow** such a call if made by or on behalf of a tax-exempt, nonprofit. The tax-exempt, non-profit exemption in the law applies **only** to subsection (c).

court. It is unconscionable to allow such thievery to be protected via an exemption that larger companies do not receive.

The cost to small businesses should be minimal. As small businesses they will probably not be faxing outside of the local area. If they are, they are probably financially able to establish the necessary cost-free mechanism. It should also be noted that the vast majority of small businesses will not, and indeed are probably not capable of, blast fax on a large scale. They will use broadcast fax companies to do their dirty work, and may therefore use that company's "opt-out" mechanism. Therefore the small business exemption is unnecessary and unwarranted and should not be given as another excuse for junk faxing.

If the Commission chooses to establish such an exemption, it should be limited to those small businesses that **do not use a third party faxer**. It should be limited to those small businesses (as defined by the SBA) that own their own faxing equipment and do their own faxing in batches of 1000 or less over a given period of time.²⁰

F. Unsolicited Advertisements

The most onerous provision of the JFPA, and the one that causes pundits to call it the "Junk Fax Protection Act" or "Junk Fax Proliferation Act", is the provision that countermands the Commission's decision to require written permission before faxing advertisements to consumers. This alone will probably result in a 50% increase in junk faxes over the next few years. Broadcast companies will no longer need to falsify documents showing "consent" and it will be much easier to evade the law.

The burden of showing prior express invitation or permission should of course rest with the advertiser or sender of the fax. Such proof should be in writing, though it may be "otherwise" demonstrated via a third party verification such as that that is required to change long-distance carriers. Such recorded verification **must** be clear and precise statements by the consumer and must not be a recording of the consumer responding simply "Yes" or "No" to a series of questions. Unscrupulous companies have in the past used a variety of tactics to get a consumer to say "Yes" or "No", then used those responses to make it seem the consumer consented to a switch in carriers. Junk faxers are by their very nature unscrupulous. They believe that they may steal someone's property in order to get their advertisement across.

In developing its regulations to define the "or otherwise" contained in the definition of the unsolicited advertisement, the Commission must remember that the rights of the consumer must be balanced with the needs of the industry. The key word here is "balanced". In the past, the Commission has tended to bend over backwards to accommodate the needs of the industry.

Conclusion

The Commission must be exceedingly mindful of the behavior of the fax industry as it develops the new regulations.

²⁰ I suggest 30-days if this suggestion is adopted.

The junk fax industry, and its affiliated advertisers and customers, have proven to be an unscrupulous collection of sociopaths that have no regard for other people's property. They have, and will continue to, violate the law even as the Commission tries to assist them in complying with it.

The industry's new model involves inserting as many layers as possible between the advertiser and faxer to confuse the courts and maximize the advertiser's chances of evading the law. The Commission should be aware of the model as it generates these new rules and word the new regulations carefully. Generalizations are no longer acceptable. Clear, precise, and above all **simple** words are necessary. The Commission must specify what constitutes compliance using terms that cannot be misinterpreted, and must once again emphasize that the advertiser is liable even in cases where there are several intermediaries.

Finally, the Commission would be well advised to revisit the new regulations after a relatively short period of time. Perhaps as soon as 18-months after implementation, the Commission should seek comments on how effective the regulations are, and how they may be improved. It is unacceptable for the Commission to allow the number of complaints to drive the bus. As previously noted, the lack of enforcement actions against serial violators has caused many to simply not complain.

I again thank the Commission for giving me the opportunity to comment on the proposed rules. I hope my input will have a positive effect on the Commission's actions.

Wayne G. Strang